# *Review of the Policy on Access to Court Information*

## NSW Attorney General's Department

## Submission by the Australian Privacy Foundation.

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## *The Australian Privacy Foundation*

The Australian Privacy Foundation is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

## Overview comments

The Foundation (APF) welcomes the Review's recognition of the need for a more authoritative, consistent and uniform approach to the access of court information. Although the way privacy laws are written often excludes awareness of the fact, privacy concerns are frequently raised by the way personal information is handled in the court system. Some of this is an inescapable consequence of the stresses of litigation and the legitimate public interest in the administration of justice. At the same time people should not feel that they must sacrifice all rights to privacy when they become involved in legal action. The Review provides a valuable opportunity to achieve an appropriate balance.

The recent circulation of parts of an untendered affidavit and subsequent widespread media comment on its contents, notwithstanding an injunction against publication in the case of *Nine Network Australia v Seven Network (Operations)* [2006] NSWSC 669 can be seen to pose issues which need to be considered in the context of the proposals in the Discussion Paper. The public discussion of the contents of the affidavit highlighted alleged conversations which were embarrassing if not damaging to people who were not directly involved in the litigation. We are not claiming that the copy that formed the basis for public comment was obtained through an inspection of court records. However we do note that Mr Justice Campbell's ruling of 27 June not to lift the injunction indicated that this was not an instance in which publication could be considered in the interest of open justice at this stage. This underlines the importance of recognising that the context in which personal information arises often determines appropriate ways of handling it.

## General principles

Our main concern is with the privacy implications of the Discussion Paper's recommendations. We recognise that privacy is only one of the values that drives a concern for regulating access to court documents. On the one hand the principle of open justice argues for maximising availability of information relevant to the conduct of court proceedings. On the other hard there are circumstances where the release and circulation of information arising from proceedings would run counter to the *interests of justice* and the important functions the judicial system is intended to serve. Other distinct interests such as security and the public interest in the integrity of public administration may also come into play.

It is important to distinguish between those interests that relate directly to the judicial process and the public interest in protecting personal privacy. Privacy is the right of individuals to have reasonable opportunities to choose what aspects of their life are made known to others. For example the *privacy* argument against the disclosure of residential addresses is not because this might encourage vigilantism or lead to a vulnerable party or witness being harassed but because people generally have a *right* to withhold that information from people who do not have a good reason for knowing it. Some parts of the discussion paper carry the implication that privacy should only prevail against the interest in open justice where it can be linked with one or other of the other interests. For example on page 16 there is the statement:

> *"Protection of privacy will outweigh the principle of open justice when it is necessary to do justice between the parties by ensuring that their welfare is not affected, or their rights prejudiced, to the extent that they would not be prepared to give evidence freely."*

The overriding policy principles on access expressed on pages 19-20 of the Discussion Paper show a similar contradictory approach to balancing privacy and interests in justice. This approach can be seen to underrate the importance of privacy as a distinct right, which should be factored into decisions on access where countervailing interests of justice are weak. It is difficult to see how privacy can be adequately protected unless court officers have sufficient discretion to reach an appropriate balance where issues of access arise.

In a broader sense, the interests of justice may be compromised if individuals are deterred from pursuing legal remedies because of the way their affairs may be disclosed. Recent survey research indicates that individuals avoid seeking services or pursuing rights to which they are entitled if the cost to their privacy is too high.

## The Proposals

Striking an appropriate balance between privacy and other interests becomes important in relation to a number of the Discuss Paper's specific recommendations. Proposal 1c recommends that the exemption in section 6 of the Privacy and Personal Information Protection Act relating to the judicial function of a court should be clarified to ensure privacy protection for information covered by non-judicial functions. The APF supports this proposal, but notes that it is important to be clear about what such an amendment should achieve. Coverage by the privacy legislation involves more than simply determining whether documents can be accessed or not. It means that court registries would have to follow a range of practices intended to enhance individual's control over information that relates to them. This includes ensuring that individual litigants, particularly those without legal representation and, where reasonably practicable, third parties are made aware of how court information handling practices may effect their information. Clarifying the distinction between judicial and non-judicial functions needs to also recognise that the legal status of information may change while it is in the custody of the court.

Section 6 of the PPIP Act is similar to a similar provision in section 10 of the Freedom of Information Act, the application of which is also regarded as uncertain. As freedom of information provides an alternative route for obtaining information from records that fall outside the scope of the judicial function, steps should be taken to amend the Freedom of Information Act concurrently with recommendation 1c.

Proposal 3 recommends replacing the current discretion based process for releasing information with one which depends on a rule based classification into classes of records which are presumed to be subject to open or restricted access. The information protection principles in privacy legislation have a very significant element of discretion built into them. For example record custodians are expected to take reasonable steps to inform individuals of how their information may be used and make reasonable assessments as to whether disclosure is necessary in given circumstances for law enforcement or similar purposes. To introduce a process which largely eliminates the exercise of discretion can be seen as inconsistent with a commitment to adhere to privacy principles. The APF supports a process that would retain the element of discretion, even if it is structured so as to support the principle of open justice in appropriate circumstances. Proposals 9 and 10 go some way to meet this concern although their effect would be limited to restricted documents. Proposal 16 suggests that discretion will also apply to the release exhibits other than tendered witness statements.

There is a brief discussion of confidentiality on pages 14 to 15, noting the lack of guiding principles about how criteria of confidentiality should be applied in the context of access to court records. A further issue in relation to confidentiality should be mentioned, although this may fall outside the Discussion Paper's terms of reference. This relates to parties disclosing the contents of confidential tendered material outside a hearing, often on the basis of what is said in the course of the hearing. In principle legal practitioners are subject to ethical constraints against doing this, but this does not apply to litigants, particularly unrepresented litigants and their supporters. We are aware of instances where discussion of intimate health and family details outside the court has caused personal distress and created the impression that courts are a privacy free zone. Realistically there may be little that the court system can do to restrain such disclosures, beyond drawing attention to the confidentiality issue involved. It may nevertheless be appropriate for an overriding policy on access to information that incorporates privacy and confidentiality issues to identify the issue.

Page 31 of the Discussion Paper recommends an approach to limiting access to sensitive and personal information in open access documents similar to the criteria used to restrict access to records in the open access period under public records legislation. It is submitted that the two situations are not analogous. The Open Access criteria for public records are appropriate for records which have been in existence for more than 30 years where the information they contain can be presumed to be no longer current. Strict application of information privacy principles to these records would inhibit their primary use as research data. Accordingly there is a justification for not withholding access unless the information retained is inherently sensitive or has the capacity to cause distress or heightened risks. For information in a court file which relates to individuals' ongoing affairs, more stringent standards of privacy protection are justified to prevent the information being misused or inappropriately used in ways that the person making the release could not be expected to fully anticipate.

Proposals 6 and 7 would allow parties to file copies of open access documents that omit specifically defined classes of sensitive and confidential information that would be included in the versions made available to the court. The APF considers that the court should retain a residual discretion to extend the classes of information that should not be disclosed where the context makes this appropriate.

Proposal 10 recommends that access to restricted access documents should be subject to the provisions of the Privacy and Personal Information Protection Act. This is as close as the Discussion Paper gets to a consideration of representing the privacy interests of individuals other

than parties who may be affected by the way access is provided. Under sections 8 and 11 of the Privacy and Personal Information Protection Act court registries may be required to notify individuals that their information may be disclosed in specific circumstances. This would apply whether the individual concerned was a party to proceedings, a witness, or a third party mentioned in the relevant documents.

The APF believes the recommendation should go further. Affected individuals should be made aware of the likelihood of disclosure where this is practicable, and given the opportunity to make representations which will be considered before a determination is made. There should be a clear policy direction to take appropriate steps to inform individuals of the possibility that personal information about them may be disclosed. For parties and witnesses this requirement could be satisfied by a general notice at or before a hearing. Where third parties are concerned this may not always be practicable. However, the Freedom of Information Act requires public sector authorities to take reasonable steps to consult with third parties whose personal affairs would be adversely impacted by proposed disclosures. A similar process should apply to applications for access to restricted court records.

Proposal 11 recommends express legislative prohibition of the electronic compilation of open access information by a non-party and restricting the ability to access multiple sets of information for data mining purposes, without explicit permission. While the APF supports the sentiment behind this proposal, we consider that it may need to be examined more closely in terms of practicality.

The Internet creates an environment in which the kind of safeguards proposed could be seen to have only a token effect. Alternatively imposing a broad regulatory framework could impact arbitrarily on legitimate users of the Internet who are not aware of the restrictions it imposes. The law should not interfere with legal firms and public interest groups that make compilations from publicly available court records to provided information to their clients and members. The APF does not favour laws which would expose private individuals or independent researchers inadvertently to penalties.

At the same time, if the purpose of the recommendation is to control the use of civil judgement information by credit reference providers and their customers, any regulation should be crafted in collaboration with the Commonwealth Privacy Commissioner in a way which harmonises with the way consumer credit information is regulated under the Privacy Act 1988. Similarly the application of proposed restrictions on compilers of case databases should take account of the way State and/or federal privacy laws apply to them.

The APF supports the intention of proposal 14, to administer open access in such a way as avoid a breach of spent conviction legislation. Spent conviction legislation provides an important, though limited, protection against inappropriate use of information, which can have an extremely prejudicial effect on the people concerned. It is a form of protection that cannot be guaranteed by alternatives such as anti-discrimination legislation. We would also point out that the compilation of external case databases also leads to a situation where details of spent convictions can be accessed and used as a basis for taking prejudicial action. This may be because of the length of time which has passed or more immediately because a conviction has been quashed. According proposal 11 should address the need for compilers of such databases to take reasonable steps to minimise these prejudicial effects. A statement or undertaking to this effect in agreements to copy and/or publish court records would define an obligation which could be enforced by privacy legislation applicable to the data compiler.

Proposal 15 recommends that the discretion of the court to release exhibits other than tendered witness statements should be retained. The Discussion Paper notes the increasing tender of computerised records as exhibits. Often these will contain personal or confidential information beyond what is relevant to the matter being contested. A policy framework that addresses how

determinations to disclose exhibits are to be made needs to identify these confidentiality and privacy issues.

The criteria for suppressing publication in proposals 16 to 20 are dictated by the interests of justice and would only indirectly promote privacy outcomes. To explicitly discuss privacy issues in this context would raise complex issues in relation to the media exemption under the Commonwealth Privacy Act, and the appropriateness of a tort of privacy. We therefore choose not to comment on these recommendations.

## Conclusion

Privacy is a distinct human right that should be recognised on its own terms. Like any other human right it is subject to limitations where it comes into conflict with other rights or important public interests. The standard suite of internationally recognised information privacy principles recognises the need to balance competing rights and interests by incorporating substantial areas of discretion in how the principles are applied subject to overriding accountability. The emphasis on discretion also reflects the fluid nature of information and the need for a form of regulation that addresses the multiple ways in which information can be used or misused.

Those responsible for managing personal information often crave hard and fast rules to overcome the uncertainty of discretionary principles. Such an approach is understandable in a court environment which relies on a multiplicity of rules are applied to reduce the uncertainty inherent in the litigation process. Nevertheless there is a cost to both privacy and justice in replacing discretionary principles with hard and fast rules. A more consistent approach is one which retains substantial discretion but provides a clear framework to guide the manner in which this discretion is exercised.

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